BYU Law Review

Volume 1998 | Issue 2 Article 16

5-1-1998

Giving a Hoot About an Owl Does Not Satisfy the Interest Requirement for Intervention: The Misapplication of Intervention as of Right in Coalition of Arizona/ New Mexico Counties for Stable Economic Growth v. Department of the Interior

Rodrick J. Coffey

Giving a Hoot About an Owl Does Not Satisfy the Interest Requirement for Intervention: The Misapplication of Intervention as of Right in *Coalition of Arizona/ New Mexico Counties for Stable Economic Growth v. Department of the Interior*

I. INTRODUCTION

Federal Rule of Civil Procedure (FRCP) 24(a)(2) defines the interest requirement that is necessary in order for an applicant to intervene as of right in pending litigation.[1] The interpretation of that interest requirement has been the subject of great dispute within the federal courts. Unfortunately, the Supreme Court has not offered much guidance in this area, and the few Supreme Court cases that are directly on point are vague and have led to the development of conflicting rules between the various federal appellate courts. Some circuits require that potential intervenors satisfy the Constitution's Article III standing requirements,[2] while others have suggested that an intervenor need only satisfy a significantly lesser requirement,[3] including in some cases, a mere political interest in the subject

1. FED. R. CIV. P. 24(a)(2).

2. *See* Solid Waste Agency v. United States Army Corps of Eng'rs, 101 F.3d 503, 507 (7th Cir. 1996); Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996); City of Cleveland v. Nuclear Regulatory Comm'n, 17 F.3d 1515, 1517 (D.C. Cir. 1994); United States v. 36.96 Acres of Land, 754 F.2d 855, 858 (7th Cir. 1985); Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 779 (D.C. Cir. 1984).

3. *See* Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 837 (9th Cir. 1996) (holding that in order to have standing "no specific legal or equitable interest need be established"); Associated Builders & Contractors v. Perry, 16 F.3d 688, 690 (6th Cir. 1994) (holding that an intervenor does not have to have Article III standing); Meek v. Metropolitan Dade County, Fla., 985 F.2d 1471, 1480-81 (11th Cir. 1993) (holding that interest groups that lack Article III standing can intervene); Purnell v. City of Akron, 925 F.2d 941, 948 (6th Cir. 1991) (holding that no specific legal or equitable interest is required to intervene as of right, and the applicant need not have Article III standing).

matter of the suit.[4] The remaining circuits fall somewhere in between these two poles.[5]

Although every circuit claims to require that the proposed intervenor have a legally protected interest,[6] there is a discrepancy between the circuits as to what constitutes a "legally protected interest." The case of *Coalition of Arizona/ New Mexico Counties for Stable Economic Growth v. Department of the Interior*[7] is a prime example of a federal circuit court allowing an applicant to intervene as of right with substantially less than a true legally protected interest. *Counties for Stable Growth* and the conflict between the circuits illustrates why the Supreme Court should provide a clearer definition of what constitutes a protected interest under FRCP 24 (a)(2). Although the Supreme Court has not specifically defined the meaning of "protected interest," some of the Court's decisions indicate that the Tenth Circuit's standard in *Counties for Stable Growth* is too permissive.[8]

Part II of this Note discusses the background of this issue, including other circuits' rulings in intervention cases that conflict with the holding in *Counties for Stable Growth* and Supreme Court cases that are on point, including the Court's recent decision indicating that the Court is moving towards requiring Article III standing for intervenors. Part III examines the facts and the Tenth Circuit's reasoning in *Counties for Stable Growth*. Part IV analyzes this case and concludes that Article III standing is the appropriate standard for determining whether a potential intervenor has a sufficient interest in the

4. *See* Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1247 (6th Cir. 1997).

5. *See* Edwards v. City of Houston, 78 F.3d 983, 1004 (5th Cir. 1996); Mountain Top Condominium Assoc. v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 366 (3d Cir. 1995); United States v. New York, 820 F.2d 554 (2d Cir. 1987).

6. *See Miller*, 103 F.3d at 1245-47; *Solid Waste Agency*, 101 F.3d at 506-07; Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Department of the Interior, 100 F.3d 837, 840-41 (10th Cir. 1996); *Mausolf*, 85 F.3d at 1300-02; Edwards v. City of Houston, 78 F.3d 983, 1004 (5th Cir. 1996); *Mountain Top*, 72 F.3d at 366; Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1398 (9th Cir. 1995); United States v. Georgia, 19 F.3d 1388, 1393 (11th Cir. 1994); *City of Cleveland*, 17 F.3d at 1517; Travelers Indem. Co. v. Dingwell, 884 F.2d 629, 638 (1st Cir. 1989); United States v. New York, 820 F.2d 554 (2d Cir. 1987).

7. 100 F.3d 837 (10th Cir. 1996).

8. *See* Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1067 (1997); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

pending litigation to intervene as of right, and that the proposed intervenor in *Counties for Stable Growth* did not have a sufficient legally protected interest in the case and should not have been permitted to intervene because the applicant failed to satisfy any of the three requirements[9] necessary for an applicant to intervene as of right. Furthermore, the Tenth Circuit's standard for determining whether an applicant has a sufficient interest in the litigation to intervene is not the correct standard the federal courts should employ because the Tenth Circuit's liberal leniency may violate the Constitution. Finally, it allows too many applicants to intervene as of right, putting an unmanageable strain on the judicial system.

II. BACKGROUND

FRCP 24(a)(2) permits intervention as of right:

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.[10]

Courts generally use a three part test for determining whether an applicant should be permitted to intervene as of right in federal courts.[11] First, the applicant must have an interest in the litigation. This interest requirement is the subject of the current debate between the federal appellate courts because it is not specifically defined by Rule 24 or Supreme Court precedent. Second, a ruling that is adverse to the applicant must impair or impede the applicant's ability to protect the interest. Third, the applicant's interest must not be adequately represented by the existing parties. All three of these requirements are necessary in order for an applicant to intervene as of right.[12]

---

9. *See* FED. R. CIV. P. 24(a)(2).

10. *Id.*

11. *See, e.g.*, Donaldson v. United States, 400 U.S. 517 (1971).

12. In addition to these three requirements, the application must be timely. Both parties conceded that Dr. Silver, the applicant for intervention in *Counties for Stable Growth*, had satisfied this requirement. *See* 100 F.3d at 840.

Even before intervention becomes an issue, Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies."[13] A plaintiff wishing to bring an action in federal court must have Article III standing.[14] One must satisfy three requirements in order to have Article III standing. First, the plaintiff must have suffered "an 'injury in fact'—an invasion of a legally protected interest which is concrete and particularized, and 'actual or imminent,' not 'conjectural' or 'hypothetical.'"[15] Second, the injury must be "fairly traceable" to the conduct of the defendant.[16] Third, it must be "likely" that the alleged injury will be redressed by a favorable adjudication.[17] Because Article III standing is the standard for determining whether a plaintiff may bring a cause of action in federal court, some courts have suggested that intervenors should have to satisfy that standard as well.[18]

The Supreme Court has only addressed the issue of intervention as of right a few times,[19] and those few cases have shed little light on the necessary interest requirement. As a result, the federal circuits are currently split on the proper standard for determining whether an applicant can intervene. This split of authority causes confusion and needs to be resolved by the Supreme Court in order to establish a uniform interpretation of the FRCP 24 interest requirement.

---

13. U.S. CONST. art. III, § 1.

14. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982).

15. *Lujan*, 504 U.S. at 560 (citations omitted). This interest requirement for standing is the standard used for deciding issues of intervention in the Seventh, Eighth, and D.C. Circuit Courts. Those circuits apply the Article III standing requirement to potential intervenors. *See* Solid Waste Agency v. United States Army Corps of Eng'rs, 101 F.3d at 503, 506 (7th Cir. 1996); Mausolf v. Babbitt, 85 F.3d 1295, 1300-02 (8th Cir. 1996); City of Cleveland v. Nuclear Regulatory Comm'n, 17 F.3d 1515, 1517 (D.C. Cir. 1994); United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985); Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 779 (D.C. Cir. 1984).

16. *See Lujan*, 504 U.S. at 560 (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

17. *See id.* (citing *Simon*, 426 U.S. at 38, 43).

18. *See Solid Waste Agency*, 101 F.3d at 507; *Mausolf*, 85 F.3d at 1300; *City of Cleveland*, 17 F.3d at 1517; *36.96 Acres of Land*, 745 F.2d at 858; *Kelley*, 747 F.2d at 779.

19. *See* Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 432-34 (discussing the few Supreme Court cases dealing specifically with the issue of the interest requirement for intervention).

Some of the federal appellate courts have established that potential intervenors as of right must have Article III standing.[20] In its most recent intervention case, *Solid Waste Agency v. United States Army Corps of Engineers*,[21] the Seventh Circuit followed its precedent and denied intervention as of right to an applicant who lacked Article III standing. The court stated, "because intervention can impose substantial costs on the parties and the judiciary . . . by making the litigation more cumbersome . . . , the would-be intervenor will not be permitted to push out the already wide boundaries of Article III standing."[22] Recent rulings in the Eighth Circuit[23] and the D.C. Circuit[24] have established the same rule, indicating that allowing one to intervene without Article III standing violates the Constitution.

Other federal appellate courts have established more relaxed standards for potential intervenors similar to the Tenth Circuit standard in *Counties for Stable Growth*.[25] The Sixth,[26] Ninth,[27] and Eleventh Circuits[28] have all specifically ruled that it is not necessary for an intervenor as of right to have Article III standing to sue. Because of these significantly different approaches to the necessary interest requirement for intervention as of right, there is a confusing lack of uniformity among the circuits. The Supreme Court should specifically rule on this issue to clarify the discrepancy among the circuits by

20. *See* cases cited *supra* note 18.

21. 101 F.3d 503 (7th Cir. 1996).

22. *Id.* at 507 (citations omitted).

23. *See Mausolf*, 85 F.3d at 1295.

24. *See City of Cleveland*, 17 F.3d at 1515.

25. *See* Northwest Forest Resource Council v. Glickman, 82 F.3d 825 (9th Cir. 1996) (holding that an applicant need not possess Article III standing to intervene); Associated Builders & Contractors v. Perry, 16 F.3d 688 (6th Cir. 1994) (holding that an applicant need not have Article III standing to intervene); Meek v. Metropolitan Dade County, Fla., 985 F.2d 147 (11th Cir. 1993) (holding that interest groups that lack Article III standing can intervene); Purnell v. City of Akron, 925 F.2d 941 (6th Cir. 1991) (holding that no specific legal or equitable interest is required to intervene as of right, and the applicant need not have Article III standing).

26. *See Purnell*, 925 F.2d at 948.

27. *See* Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9th Cir. 1994).

28. *See Meek*, 985 F.2d at 1471.

providing a uniform standard for all federal courts to follow. This Note provides an approach the Court should adopt.

III. *COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH V. DEPARTMENT OF THE INTERIOR*

A. Facts

In 1996, pursuant to FRCP 24(a)(2), commercial wildlife photographer, Robin Silver, sought to intervene as of right in a suit brought by a coalition of counties against the Department of the Interior (DOI) and the Fish and Wildlife Service (FWS).[29] The counties challenged the DOI's decision to protect the Mexican spotted owl under the Endangered Species Act (ESA).[30] Among other things, the Coalition claimed that the DOI had not only "failed to use the best available data" when it decided to place the owl on the threatened species list, but also misapplied the data that it used.[31] The Coalition sought a "'permanent injunction enjoining [the DOI] from taking any actions pursuant to the listing of the [owl]'"[32] and an order that the DOI remove the owl from the threatened species list.[33]

Silver had lobbied[34] and successfully sued the DOI for the owl to be included on the threatened species list.[35] Silver relied on 16 U.S.C. § 1540 (g)(1)(A), which empowers citizens to sue the DOI for injunctive relief if it fails to perform its nondiscretionary duties.[36] Silver sought to intervene on the side of DOI in the counties' suit.[37] He claimed an interest in the owl's classification as a threatened species.[38] He also claimed an interest in observing the owl's aesthetic beauty.[39] Despite Silver's claims of a legally protected interest in the subject

29. *See* Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Department of Interior, 100 F.3d 837, 839 (10th Cir. 1996).

30. *See id.*

31. *See id.* at 844.

32. *Id.* (alteration in original) (quoting Appellant's Appeal at 25).

33. *See id.*

34. *See* 58 Fed. Reg. 14,248, 14,252 (1993).

35. *See* Silver v. Babbitt, 166 F.R.D. 418 (D. Ariz. 1994), *aff'd*, 68 F.3d 481 (9th Cir. 1995).

36. *See Counties for Stable Growth*, 100 F.3d at 841.

37. *See id.* at 839.

38. *See id.*

39. *See id.*

matter of the litigation, both parties to the suit opposed his application for intervention.[40]

The United States District Court for the District of New Mexico denied Silver's application to intervene as of right.[41] The district court allowed Silver to submit an amicus curiae brief, but held that he lacked a substantial, legally protected interest in the subject matter of the litigation.[42] However, on appeal the Tenth Circuit ruled that Silver could intervene as of right.[43]

B. The Court's Reasoning

In *Counties for Stable Growth*, the Tenth Circuit evaluated Silver's application to intervene as of right and determined that he had satisfied all of the FRCP 24(a)(2) requirements.[44] The court began its analysis by addressing whether Silver had a direct, substantial, and legally protected interest in the pending litigation. It found that there were two reasons why Silver had a sufficient interest to satisfy the requirements of FRCP 24(a)(2).[45]

First, the court reasoned that because Silver had initiated the political and legal processes to protect the owl by suing FWS and DOI for failure to designate critical habitat, the statutes[46] empowering Silver to pursue those courses of action also gave Silver a legally protected interest in the owl.[47] Those statutes permit private citizens to "commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . , who is alleged to be in violation" of the Endangered Species Act.[48] Second, because Silver was a wildlife photographer, the court reasoned that his "'desire to use or observe an animal species, even for purely aesthetic purposes,

40. *See id.* It is particularly worth noting that the defendant, the DOI, did not want Silver to intervene, which supports the contention of this Note that the Article III standard for intervention harms no one who is already a party to a law suit.

41. *See id.*

42. *See id.*

43. *See id.* at 846.

44. *See id.*

45. *See id.*

46. *See* 16 U.S.C. § 1533(b)(3) (1995); 16 U.S.C. § 1540(g)(1) (1995).

47. *See Counties for Stable Growth*, 100 F.3d at 841.

48. 16 U.S.C. § 1540(g)(1)(A) (1995).

is undeniably a cognizable interest'"[49] sufficient to allow him to intervene as of right.

The court went on to assert that Silver's interest would be impaired if he was not allowed to intervene as of right.[50] The court reasoned that because a ruling adverse to Silver's position would force him to submit a new petition for the owl to be placed on the threatened species list, leaving the owl unprotected in the meantime, Silver's interests would be impaired.[51] Thus, the court held that Silver satisfied the second requirement for intervention as of right.

The court also held that Silver satisfied the third requirement of FRCP 24(a)(2) because the DOI did not adequately represent Silver's interests.[52] The court reasoned that because the DOI must represent the public's interest, its interest may differ from Silver's interest in maintaining the owl in its natural habitat where he could photograph it.[53] Furthermore, because the DOI had been reluctant to protect the owl in the past, as demonstrated by the fact that Silver had to sue the DOI for the owl's placement on the threatened species list, there was a question as to whether the DOI would zealously protect Silver's interest.[54] Because the Tenth Circuit determined that Silver had satisfied all three of the requirements, it overruled the district court and allowed Silver to intervene as of right.[55]

49. *Counties for Stable Growth*, 100 F.3d at 842 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992)).

50. *See id.* at 844.

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.* at 845.

55. *See id.* at 846.

IV. ANALYSIS

A. The Article III Standing Requirements Should Be the Proper Test for the Interest Requirement Under FRCP 24

1. Supreme Court precedent strongly indicates that Article III standing is the proper standard

In the first Supreme Court case dealing with the issue of the interest requirement for intervention, the Court held that the interest requirement stated in FRCP 24(a)(2) was a "significantly protectable interest," which the Court defined as an interest that the applicant could claim during a trial.[56] Such an interest is analogous to the interest required for Article III standing.[57] A few years later, in *Diamond v. Charles*,[58] the Court held that in order to appeal a lower federal court decision, any appellant must have Article III standing.[59] Because of this requirement, a physician in *Diamond* who sought to appeal a lower court decision regarding an Illinois abortion law as an intervenor was denied the right to appeal because he lacked Article III standing.[60] The implication of *Diamond* is that while the intervenor can have all of the rights of a party to the action at the trial level, he cannot appeal unless he has Article III standing.[61]

Recently, in the case of *Arizonans for Official English v. Arizona*,[62] the Supreme Court reiterated its holding in *Diamond*. The Court stated, "'[S]tanding to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess 'a direct stake in the outcome.'"[63] However, the Court in *Arizonans* interpreted *Diamond* to mean even more. It stated that "[t]he standing Article III requirements must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance."[64] The most notable segment of that statement is the reference to "persons appearing in courts of first instance," because that phrase, on its face, encompasses intervenors as well as parties to the action. The logical implication of this statement is that intervenors must have Article III standing. This indicates that the federal appellate

56. Donaldson v. United States, 400 U.S. 517, 531 (1971).

57. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (holding a plaintiff in federal court must show an invasion of a "legally protected interest" in order to have Article III standing).

58. 476 U.S. 54 (1986).

59. *See id.* at 64-69.

60. *See id.* at 71.

61. *See id.*

62. 117 S. Ct. 1055 (1997).

63. *Id.* at 1067 (quoting *Diamond*, 476 U.S. at 62).

64. *Id.*

courts that have already required Article III standing for potential intervenors have established the correct standard, while the other circuits, including the Tenth Circuit, that have established more lenient standards have interpreted *Diamond* too liberally, and therefore, incorrectly.[65]

The holding in *Arizonans* is particularly significant because the Supreme Court had not expressly addressed the interest requirement of FRCP 24(a)(2) since its holding in *Diamond*. Because the Court has now indicated that *Diamond* may stand for the proposition that intervenors must have Article III standing to intervene, cases that allow intervention as of right with a showing of an interest less than that prescribed by Article III may be struck down in the future. This supports the argument against the Tenth Circuit's decision in *Counties for Stable Growth*.[66] Given the Supreme Court's holding in *Arizonans*, it is likely that Article III standing will be the basis for establishing that an applicant for intervention as of right has satisfied the interest requirement.

2. Problems with the Tenth Circuit's standard

Besides misapplying *Diamond*, the Tenth Circuit's approach to the interest requirement for intervention, as demonstrated by *Counties for Stable Growth*, is too lenient and may lead to several serious problems. First, Supreme Court decisions on Article III standing have indicated that all litigants in a case should have Article III standing,[67] and by allowing litigants to intervene without that standing, federal courts violate the Constitution. Second, by allowing more applicants to intervene as of right in litigation, the courts are opening the door for longer trials and fewer settlements because intervenors have

65. The Supreme Court has not officially stated that intervenors as of right must have Article III standing at the trial court level. However, the implication of *Arizonans* is that if the Court were to encounter an intervention as of right case in the future such a holding might logically follow. This holding is in line with some of the federal appellate courts.

66. Even in the absence of the Court's most recent interpretation of the interest requirement, the applicant in *Counties for Stable Growth* failed to satisfy any of the three requirements set forth by FRCP 24(a)(2).

67. *See* Arizonans for Official English v. Arizona, 117 S. Ct. 1055 (1997); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982). However, these cases have not directly spoken on the matter of the interest requirement necessary to intervene as of right.

all of the privileges that parties to the action have.[68] Thus, an intervenor can burden the legal system by preventing a settlement or prolonging a trial. This runs counter to one of the primary purposes of intervention, which is to reduce the burdens on the court system and to reach a final decision in cases by allowing all parties who have a legally protected interest to participate in the litigation. Third, because intervenors are given what amounts to party status at the trial level, it seems inconsistent to deny them the right to intervene on appeal unless they can show a greater interest than was necessary to give them intervenor status at trial. This inconsistency arises because *Diamond* established Article III standing as the requirement for an intervention on appeal[69] while some circuits have a more lenient standard for intervention at the trial level. Because the Tenth Circuit's standard causes serious problems, it is clear that Article III standing is the only workable standard for intervention as of right.

a. The Constitutional issue of adjudicating matters involving non-Article III parties. The Seventh, Eighth, and D.C. Circuits have each adopted Article III standing as the interest requirement a potential intervenor must demonstrate in order to intervene as of right.[70] In *Mausolf v. Babbitt*, the Eighth Circuit, relying on Supreme Court precedent, stated that Article III limits judicial power to cases and controversies and serves as an unyielding restraint on judicial power.[71] Furthermore, the *Mausolf* court stated, "an Article III case or controversy, once joined by intervenors who lack standing, is—put bluntly—no longer an Article III case or controversy" because "'[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States.'"[72] Thus, under the Eighth Circuit's interpretation of the Supreme Court's holding in *Valley Forge Christian College v. Americans for Separation of Church and State*, not only must a potential intervenor have Article III standing in order to intervene, if he

68. *See* Solid Waste Agency v. United States Army Corps of Eng'rs, 101 F.3d 503, 508 (7th Cir. 1996).

69. *See* Diamond v. Charles, 476 U.S. 54 (1986).

70. *See* cases cited *supra* note 18.

71. 85 F.3d at 1300.

72. *Id.* (quoting *Valley Forge*, 454 U.S. at 475-76).

lacks Article III standing but is nevertheless allowed to intervene, the federal courts no longer have the authority to hear the case.

If this interpretation of *Valley Forge*—which is supported by the recent Supreme Court ruling in *Arizonans*[73]—is accurate, then the circuits that permit intervention as of right based on a showing of less than Article III standing are violating the Constitution and exceeding the power that is conferred to them by Article III of the Constitution. This is certainly the most serious problem with the Tenth Circuit's current standard for determining whether an applicant has a sufficient interest to intervene, and this problem can only be overcome by either taking the radical step of modifying the Constitution or, less radically, by adopting Article III standing as the standard for intervenors.

The D.C. Circuit also requires that intervenors have Article III standing.[74] That court has stated that "because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties."[75] Furthermore, the court agreed with the Eighth Circuit and suggested that allowing someone to intervene with less of an interest than Article III standing would violate the Constitution because the courts would be exceeding their powers conferred thereby.[76] Therefore, all intervenors must have Article III standing, or the court that allows them to intervene under a lower standard has violated the Constitution.

b. The inefficiency and high cost of the Tenth Circuit standard. The Seventh Circuit has also adopted the Article III standard and has stated that "because intervention can impose substantial costs on the parties and the judiciary, not only by making the litigation more cumbersome but also (and more important) by blocking settlement, . . . the would-be intervenor[s] will not be permitted to push out the already wide

73. *See* Arizonans for Official English v. Arizona, 117 S. Ct. 1055 (1997).

74. *See* Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 779 (D.C. Cir. 1984).

75. City of Cleveland v. Nuclear Regulatory Comm'n, 17 F.3d 1515, 1517 (D.C. Cir. 1994).

76. *See id.*

boundaries of Article III standing."[77] Because of the great costs that intervenors impose on the judicial system and the parties to a case, the Seventh Circuit has in some cases required that an intervenor have an interest "greater than the interest sufficient to satisfy the standing requirement."[78] In addition, the Seventh Circuit declined to allow an environmental group, whose claimed aesthetic and environmental interests in pending litigation were analogous to the interests of Silver in *Counties for Stable Growth*, to intervene because they lacked a direct, substantial, and legally protected interest in the litigation.[79] Given the already heavy case load that federal courts have, any rule that will alleviate some of that burden while improving judicial integrity by eliminating the adjudication of matters involving parties who lack Article III standing should be welcomed by the courts.

c. The inconsistency of giving intervenors party status at trial level, but denying them the right to appeal. Supreme Court precedent denies intervenors who lack Article III standing the right to appeal judgments by the district courts. The Supreme Court stated in *Diamond*:

> "The exercise of judicial power . . . can so profoundly affect the lives, liberty, and property of those to whom it extends," that the decision to seek review must be placed "in the hands of those who have a direct stake in the outcome." It is not to be placed in the hands of "concerned bystanders," who will use it simply as a "vehicle for the vindication of value interests."[80]

Thus, the Supreme Court indicates that only those who have a direct stake in the outcome of the case, or in other words, Article III standing,[81] should be permitted to appeal in a

77. Solid Waste Agency v. United States Army Corps of Eng'rs, 101 F.3d 503, 507 (7th Cir. 1996) (citations omitted).

78. United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985).

79. *See id.* However, because this case pre-dated *Lujan*, "it is conceivable that the group would have been held to have standing." *Solid Waste Agency*, 101 F.3d at 508.

80. Diamond v. Charles, 476 U.S. 54, 62 (1986) (quoting Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982); Sierra Club v. Morton, 405 U.S. 727, 740 (1972) (citations omitted); and United States v. SCRAP, 412 U.S. 669, 687 (1973)).

81. *See id.* at 61-62 (arguing that only those with Article III standing have real stakes in the outcome of a case sufficient to establish a real case or controversy). Although associations or organizations may have standing to sue, this is only true if

lawsuit. *Diamond* explicitly forbids an intervenor from appealing the outcome of a case unless the intervenor has Article III standing.[82] In *Counties for Stable Growth*, Silver sought to appeal the outcome of the case as an intervenor, based on the claim that it was error for the district court to deny him the right to intervene.[83] Under *Diamond*, this action should not have made it to court unless Silver had Article III standing, and careful analysis reveals that he lacked Article III standing.[84]

Because one of the fundamental rights of the American judicial system is the right to appeal, it seems unfair to deny that right to an intervenor who has been given party status at trial. One logical solution to this disparate treatment is to require those who intervene as of right to have Article III standing. By requiring Article III standing, intervenors are able to appeal and have all of the privileges of a party to the litigation. The only other alternative to this solution would be for the Supreme Court to overrule *Diamond*. However, this seems unlikely given the Supreme Court's statements regarding Article III standing in *Arizonans*.[85] Requiring that all intervenors as of right have Article III standing provides the advantage that courts will not be overly burdened by extra parties who could not sue on their own because they lack a sufficient interest in the subject matter of the litigation. This result promotes the goals of judicial economy and efficiency.[86]

Furthermore, it is difficult to understand how a court could read *Diamond* as allowing intervention of an applicant who lacks Article III standing at the trial level, while denying the same applicant the right to intervene on appeal. This is particularly true in light of a previous Supreme Court holding in *Valley Forge* where the Court stated that only those who have Article III standing may litigate in the federal courts.[87]

---

their members would have standing in their own right. *See* Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1068 (1997).

82. *See Diamond*, 476 U.S. at 62.

83. *See* Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Department of the Interior, 100 F.3d 837, 839 (10th Cir. 1996).

84. *See supra* Part IV.A.1.

85. *See Arizonans*, 117 S. Ct. at 1055.

86. The Federal Rules of Civil Procedure include these goals among their primary purposes. *See* FED. R. CIV. P. 1.

87. *See* Valley Forge Christian College v. Americans United for Separation of

The Court went on to state that establishing Article III standing "is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution."[88] Given the holding in *Valley Forge*, and the inconsistent result that is achieved under the Tenth Circuit's interpretation of *Diamond*, it is clear that the Tenth Circuit and those other circuits with similar standards have erred.

Because of these three significant problems with the Tenth Circuit's current standard for determining whether one can intervene as of right, it should reevaluate the standard and adopt the Article III standard employed by the Seventh, Eighth, and D.C. Circuits. The Article III standard resolves all three problems by allowing intervenors to appeal, reducing the costs of litigation by permitting fewer interventions, and most importantly, avoiding Constitutional violations. Furthermore, the Article III standard appears to be more congruous with the few Supreme Court decisions that relate to the subject of the interest requirement.

3. Criticism of requiring Article III standing for intervenors is unfounded

Some legal commentators have criticized courts that have established Article III standing as the standard necessary for intervention.[89] The thrust of this criticism is that requiring Arti-cle III standing for intervenors will preclude many interest groups, especially environmental groups, from being involved in law suits.[90] While it is probable that Article III standing will preclude many interest groups from intervening, this concern pales in comparison to the assertion that courts are violating the Constitution when they permit intervention by applicants who lack Article III standing. On this point, "[t]he Supreme Court has often emphasized that a lawsuit in federal court is

---

Church & State, Inc., 454 U.S. 464, 475-76 (1982).

88. *Id.* at 476.

89. *See* Ellyn J. Bullock, *Acid Rain Falls on the Just and the Unjust: Why Standing's Criteria Should Not be Incorporated into Intervention of Right*, 1990 U. ILL. L. REV. 605; Tobias, *supra* note 19, at 415.

90. *See* Bullock, *supra* note 89, at 606-08.

not a forum for the airing of interested onlookers' concerns, nor an arena for public-policy debates."[91] The Constitution should not be forsaken in favor of special interest groups who have an interest in the litigation, but who do not satisfy the Constitutional requirements to litigate in the federal courts.

B. Silver Lacked a Sufficient Interest in the Litigation

In analyzing Silver's interest according to the Article III standing requirements, the shortcomings of the Tenth Circuit's reasoning become apparent. This section will demonstrate the analysis that the Tenth Circuit should have used in *Counties for Stable Growth* by applying the standards set forth above.

1. Previous viewing and photography of the owl does not satisfy the interest requirement

First, Silver asserted that he "ha[d] studied and photographed the Owl in the wild."[92] The court found this to be an interest sufficient to satisfy even the Article III standing requirement and, as such, clearly sufficient to satisfy its lower standard for intervention.[93] The Tenth Circuit relied on the Supreme Court's holding in *Lujan v. Defenders of Wildlife*[94] when it made this determination.[95] The Tenth Circuit reasoned that "'because the Article III standing requirements are more stringent than those for intervention under rule 24(a), [the] determination that [the applicants] have standing under Article III compels the conclusion that they have an adequate interest under the rule.'"[96]

While the proposition that one who satisfies the interest requirement for Article III standing automatically satisfies the interest requirement to intervene as of right is correct, Silver

91. Mausolf v. Babbitt, 85 F.3d 1295, 1301 (8th Cir. 1996) (citing *Valley Forge*, 454 U.S. at 473).

92. Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Department of the Interior, 100 F.3d 837, 843 (10th Cir. 1996).

93. *See id.* at 842.

94. 504 U.S. 555 (1990).

95. *See Counties for Stable Growth*, 100 F.3d at 841-42.

96. *Id.* at 842 (quoting Yniguez v. Arizona, 939 F.2d 727, 735 (9th Cir. 1991), *overruled by* Arizonans for Official English v. Arizona, 117 S. Ct. 1055 (1997)). The fact that *Yniguez* was overruled further supports the argument that *Counties for Stable Growth* is based on flawed reasoning.

did not satisfy the interest requirement for Article III standing. The Tenth Circuit's misinterpretation of *Lujan* is striking especially given that the facts in the two cases are virtually identical.[97] In *Lujan*, an environmental interest group sought an injunction to compel the Secretary of the Interior to restore a former interpretation of an environmental regulation, making it applicable to foreign businesses.[98] The Supreme Court declared that, while "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing,"[99] the plaintiffs lacked standing to sue because the group's representatives failed to show that they had "concrete plans, or indeed even any specification of *when*" they would seek to observe the threatened species in question.[100] The representatives of the environmental group claimed that they had viewed the endangered species in the past and that they intended to go to see the species again, but they failed to demonstrate that they had any concrete travel plans.[101] The requirement that a claimed injury be concrete, particularized, and imminent is necessary to support a finding of actual injury which is one of the three elements of Article III standing.[102] The Court in *Lujan* concluded that previous trips to view the threatened species alone were not sufficient to give plaintiffs a legally protected interest sufficient for Article III standing.[103]

Despite the virtually identical facts in *Counties for Stable Growth*, the Tenth Circuit found that because Silver had claimed that "he *had* photographed and studied the Owl in the wild,"[104] he had an interest sufficient for Article III standing. This conclusion conflicts with the holding in *Lujan*. According

97. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); *Counties for Stable Growth*, 100 F.3d 837.

98. *See Lujan*, 504 U.S. at 555. Article III standing requires a plaintiff to show: first, he has suffered an invasion of a legally protected interest which is imminent, concrete, and particularized; second, a causal connection between the conduct complained of and the injury; third, likelihood that the injury will be redressed if the plaintiff prevails in court. *See supra* Part II.

99. *Id.* at 562-64.

100. *Id.* at 564 (emphasis in original).

101. *See id.*

102. *See id.* at 561.

103. *See id.* at 560-61.

104. Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Department of the Interior, 100 F.3d 837, 839 (10th Cir. 1996) (emphasis added).

to *Lujan*, absent a showing that Silver had concrete plans to photograph and view the owl at a specified time in the future, he would have lacked Article III standing.[105] Such plans were never demonstrated.

While it is possible, perhaps even likely, that Silver would seek to view and photograph the owl again, the Tenth Circuit based its decision to allow Silver to intervene as of right and its assertion that he had Article III standing on his past experiences which is completely inconsistent with *Lujan*. Furthermore, Silver would have substantial difficulty demonstrating a causal connection between the Coalition of Counties' claim that the DOI "failed to follow proper procedures and lacked sufficient data sufficient to list the Owl as threatened,"[106] and the impairment of his personal interest. This is because Silver's interest was in the owl itself, while the suit concerned the data used to place the owl on the threatened species list. Thus, Silver lacked Article III standing because the Tenth Circuit misapplied the *Lujan* standard in *Counties for Stable Growth*, a case with a virtually identical fact pattern.

2. The statute empowering Silver to seek an injunction to place the owl on the threatened species list does not qualify Silver to intervene as of right in Counties for Stable Growth

The second reason that the Tenth Circuit gave for allowing Silver to intervene was that "he was instrumental in the FWS's initial decision to protect the Owl."[107] The court specifically held "that Dr. Silver's involvement with the Owl in the wild and his persistent record of advocacy for its protection amounts to a direct and substantial interest in the listing of the Owl for the purpose of intervention as of right."[108] The court based this decision on the fact that 16 U.S.C. § 1540 allows private citizens to sue the federal government for violations of the Endangered Species Act. First, § 1540(g)(1)(C) gives citizens the right to commence a civil suit against the DOI if it fails to perform its non-discretionary duties.[109] In addition,

105. *See Lujan*, 504 U.S. at 564.
106. *Counties for Stable Growth*, 100 F.3d at 839.
107. *Id.*
108. *Id.* at 841.
109. *See id.*

§ 1540(g)(1)(A) gives citizens the right to commence civil suits on their own behalf to enjoin any person, government instrumentality, or agency who is alleged to be violating the Endangered Species Act.[110]

This analysis is problematic on several grounds. First, taken to the extreme, under this analysis, anyone and everyone would be permitted to intervene as of right in cases dealing with threatened species simply because there are statutes that give private citizens the right to sue the government for noncompliance with the Endangered Species Act. This would lead to a substantial burden on the judicial system in terms of time and money. Perhaps one could argue that Silver was allowed to intervene because he sued the government under § 1540, while others who had not taken similar legal action would be precluded from intervening. However, even with that caveat, the court's analysis is still flawed because Silver no longer has a right to sue unless the DOI is not in compliance with the Endangered Species Act. Thus, if as the Tenth Circuit has suggested, one can satisfy the interest requirement to intervene as of right based on their right to sue,[111] Silver no longer had that right and therefore lacked a sufficient interest to intervene as of right. Furthermore, as the Eighth Circuit has stated, "Congress could no more use Rule 24 to abrogate the Article III standing requirements than it could expand the Supreme Court's original jurisdiction by statute."[112]

Second, the Tenth Circuit's analysis is premised on the idea that an applicant's previous legal involvement with the subject matter of a pending suit is sufficient to give that applicant a present legally protectable interest therein. However, there are numerous instances where this would be problematic. For example, a husband who litigates the division of property in a divorce settlement in which his wife was given their real property could intervene as of right in subsequent litigation involving easements or other disputed interests in the property even though he no longer has any ownership in the property. While Silver clearly had a legally protected interest in putting

110. *See id.* at 841-42.

111. *See id.* at 842.

112. Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996) (citing Marbury v. Madison, 2 L. Ed. 60 (1803)).

the owl on the threatened species list as demonstrated by his § 1540 suit, there is no indication that once the owl was placed on the list Silver maintained a legally protected interest in keeping it on the list.[113] To put it simply, the right to sue in the past should not itself give one the right to intervene as of right in the present.

3. The principal suit in Counties for Stable Growth *was over the accuracy of the data, while Silver's interest was in the owl itself*

Finally, although Silver's interest was in the owl itself, the dispute between the DOI and the Coalition of Counties was over the data that the DOI used to determine whether to place the owl on the threatened species list.[114] While a ruling that was adverse to the DOI's position would have had the effect of removing the owl from the threatened species list, the owl was not the subject matter of the litigation, rather it was the administrative procedures that the DOI used. Because Silver was neither a party adversely affected by the DOI's implementation of its procedures[115] nor an agent of the DOI, he lacked a legally protected interest in a challenge to the DOI's implementation of its own procedures. Thus, even if Silver could have established a legally protected interest in the owl, he lacked a legally protected interest to intervene as of right in the litigation between the Coalition of Counties and the DOI because the owl was not the subject of the litigation.

C. Silver's Interest Would Not Be Impaired if He Was Not Allowed to Intervene

Although the last two elements of FRCP 24(a)(2)[116] are not the focus of this Note, the court analyzed these elements in addition to the interest requirement in determining whether to permit Silver's intervention. The court determined that Silver also satisfied the second element necessary for an applicant to

113. *See* 16 U.S.C. § 1540(g)(1) (1995).

114. *See Counties for Stable Growth*, 100 F.3d at 844.

115. In fact, even if incorrect, the DOI's implementation of its procedures aided Silver by resulting in the owl being placed on the threatened species list, whereas a proper implementation may not have led to the same result.

116. FED. R. CIV. P. 24(a)(2).

intervene as of right because his interests would be impaired if he was not allowed to intervene in the case between the DOI and the Coalition of Counties.[117] The court reasoned that if the counties were successful in gaining an injunction, the owl would be removed from the Endangered Species List. As a result, Silver would have to reapply with better data to have the owl put back on the list, leaving the owl unprotected in the meantime.[118] Furthermore, the court stated that "the *stare decisis* effect of the district court's judgment is sufficient impairment for intervention under Rule 24(a)(2)."[119]

Even assuming that the stare decisis effect of a potentially adverse judgment is a sufficient impairment of an applicant's interest to allow the applicant to intervene as of right, it is unclear that there would be such an effect in this case. If the district court determined that the DOI failed to use the best available data and misapplied the data it used when the DOI decided to place the owl on the threatened species list, Silver would not be precluded from reapplying to have the owl placed on the list again by showing different data that satisfied the requirements of 16 U.S.C. § 1540.[120] Thus, an adverse ruling would not impair or prevent Silver from subsequently promoting his interest in protecting the owl.

The fact that an adverse judgment would mean the owl would be temporarily unprotected does not mean Silver's ability to subsequently protect the owl by again going through the proper administrative and, if necessary, legal channels would be impaired. Thus, Silver has not satisfied the second element of FRCP 24(a)(2). When a court rules that a piece of property belongs to one party to a suit between two parties in which a third party also claims an ownership interest to that property, stare decisis is a serious consideration because the third party has no recourse if the court has ruled that the property belongs to an original party.[121] However, it is significantly different when an applicant, like Silver, will have legal recourse to pursue his interests regardless of the outcome of the litigation

117. *See Counties for Stable Growth*, 100 F.3d at 844.
118. *See id.*
119. *Id.*
120. *See id.*
121. *See generally* Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967).

in which he seeks to intervene. In essence, the Tenth Circuit has ruled that the potential inconvenience to Silver was a sufficient enough impairment of his interests to allow him to intervene in *Counties for Stable Growth*, despite the opposition to his intervention by both original parties to the suit. A mere inconvenience should not be considered a sufficient impairment of one's interest to would satisfy the second element of FRCP 24(a)(2).

D. Silver's Interest Was Adequately Represented by the DOI

The Tenth Circuit also determined that Silver satisfied the third requirement of FRCP 24(a)(2) because his interests were not adequately represented by the DOI.[122] The court stated that it was impossible for the DOI to adequately represent Silver's interests because the DOI was seeking to protect the public's interest, not the private interest of Silver and others like him.[123] The court asserted that in instances where the government is trying to represent its own interests as well as those of private individuals, such a "conflict" alone satisfies the "minimal burden" of showing a lack of adequate representation for intervention purposes.[124] Furthermore, because the DOI had been reluctant to protect the owl, as evidenced by the fact that Silver had to sue the DOI in order to protect the owl, the court believed that the DOI's past reluctance made its present representation of Silver's interests even more suspect.[125]

Once again, the court's analysis is flawed. The court relied on several cases when it determined that Silver's interest was not adequately represented by the DOI.[126] Those cases all held that the interests of various applicants for intervention were not adequately represented by the government.[127] However,

122. *See Counties for Stable Growth*, 100 F.3d at 845.

123. *See id.*

124. *Id.* at 845; *cf.* Solid Waste Agency v. United States Army Corps of Eng'rs, 101 F.3d 503, 508 (7th Cir. 1996) (holding that a mere showing that a government agency is representing both public and private interests is not enough to establish inadequate representation without a showing of conflict between those public and private interests).

125. *See Counties for Stable Growth*, 100 F.3d at 845.

126. *See id.* (relying on Trbovich v. United Mine Workers, 404 U.S. 528 (1972); Sierra Club v. Espy, 18 F.3d 1202 (5th Cir. 1994); Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994 (8th Cir. 1993)).

127. *See Trbovich*, 404 U.S. at 528; *Sierra Club*, 18 F.3d at 1202; *Chippewa*

each of those cases is distinguishable from *Counties for Stable Growth* because they dealt with intervenors who had economic interests that were substantially different from the government's interests[128] while Silver claimed no economic interest in the litigation between the Coalition of Counties and the DOI. Silver's interest was keeping the owl on the threatened species list, which was the same interest embraced by the DOI. The DOI was defending a suit that alleged it had failed to use the best available data and misapplied the data it used when it decided to put the owl on the threatened species list.[129] Thus, the DOI would be seeking to defend the data that it used and its application thereof in order to keep the owl on the threatened species list, which is exactly the same interest that Silver possessed. Because Silver's ultimate interest was also in keeping the owl on the threatened species list, these interests are identical for the purpose of determining the adequacy of representation in this case. The DOI would seek to have its data and procedure approved by the court in order to keep the owl on the list, and thus it is difficult to see how Silver's interests were not adequately represented by the DOI. Furthermore, because Silver did not have an economic interest in the owl—that was conflicting with the DOI's interest—it is difficult to understand how his interest would not be adequately represented given that it was the same as the DOI's interest. Because Silver's interest would be adequately represented by the DOI, he also failed to satisfy the third necessary element of FRCP 24(a)(2).

V. CONCLUSION

In *Coalition of Counties*, the Tenth Circuit erred when it allowed Silver to intervene. The proper test for determining whether an applicant has a sufficient, legally protected interest in pending litigation to intervene should be based on the interest requirement for Article III standing. This is the standard that has already been adopted by some of the federal appellate courts. This standard puts intervenors on an equal level with the parties to a case, increases judicial economy by

Indians, 989 F.2d at 994.

128. *See* cases cited *supra* note 127.

129. *See Counties for Stable Growth*, 100 F.3d at 844.

reducing the number of interventions, and ensures that the delicate separation of powers established by the Constitution is not upset by the judiciary exceeding its Article III power. Furthermore, the Article III standard appears to be consistent with the Supreme Court's holdings in several cases indirectly addressing this particular issue.

Under the Article III standing requirements, Silver clearly lacked a sufficient interest in the litigation between the Coalition of Counties and the DOI. He also failed to satisfy the Tenth Circuit's lower standard for evaluating whether an applicant's interest is sufficient to intervene as of right. Not only did Silver lack a sufficient legally protected interest in the litigation, he also failed to satisfy the other two requirements that are necessary for one to intervene as of right pursuant to FRCP 24(a)(2). Because Silver did not satisfy any of those requirements, his application to intervene as of right should have been denied. The Supreme Court should specifically define the proper standard for determining whether an intervenor has a sufficient interest to intervene as of right and clear up the confusion and disagreements that exist among the circuits. If and when it does, the Court should follow the Seventh, Eighth, and D.C. Circuits and establish Article III standing as the standard by which the interests of applicants for intervention are evaluated.

Rodrick J. Coffey